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May 5, 1998

Environmental Protection Agency
Attention Title VI Guidance
Office of Civil Rights
Mail Code 1201
401 M Street, SW
Washington, DC 20460

RE: Interim Guidance on Title VI and Environmental Permitting

To the Office of Civil Rights:

We write jointly to express comments on the interim guidance on claims under Title VI of the Civil Rights Act of 1964 relating to new or modified environmental permits. We urge the agency to desist in its effort to import into environmental decisionmaking "adverse impact" analysis from civil rights law. That doctrine, which infers racial discrimination not from intent but from disproportionate effect, is legally inapplicable to environmental policy and could lead to constitutionally impermissible results.

INTRODUCTION

The whole premise that environmental hazards are purposely placed in minority or low-income communities for racially motivated reasons is misguided at its core. And reliance on "bean-counting" measures--which purport to create a quick fix in areas like employment practices and voting rights--cannot be used to promote environmental protection. Environmental harm and pollution are colorblind. There is no reason to protect one neighborhood and not another because of their respective racial compositions. Proposed actions that provide only a statistical balance in lieu of informed decsionmaking on health and safety grounds benefit no one in the end.

"Environmental justice" advocates are rightly concerned about the health and safety of the residents of the affected community. But problems with pollution or other environmental hazards affect groups as diverse as Hispanic farmworkers handling pesticides, Asian immi-

grants working with toxic chemicals in the Silicon Valley, Native Americans living near nuclear waste facilities, and urban blacks who assert that their neighborhoods serve as dumps for polluting industries.

Toxins do not discriminate, and combating their spread should not be made a racial issue. Whether or not they violate federal law should not turn upon the race of the people affected. Policies that are driven by racial statistics are doomed to failure because they will not address the underlying health and safety issues.

I. EPA LACKS AUTHORITY TO PURSUE ADVERSE IMPACT CLAIMS UNDER TITLE VI

Regarding the applicability of civil rights law to issues of environmental law and policy, a threshold question is the Environmental Protection Agency's enforcement authority under Title VI. In creating regulatory agencies, Congress has invested them with carefully defined powers relating to their assigned area of expertise. EPA's mission, as defined by Congress, is environmental protection. Neither Title VI nor EPA's implementing legislation provides authority to the EPA to devise and pursue novel constructions of civil rights laws. Indeed, an aggrieved party in an "environmental justice" enforcement action legitimately could raise the absence of statutory authority as a defense to any purported EPA enforcement action in this area.

There is no evidence that Title VI itself contemplates such claims, let alone that EPA has authority to devise and implement adverse impact requirements. Under the U.S. Constitution, a challenge to state action requires a showing of discriminatory intent. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976). The U.S. Supreme Court in *Regents of the University of California*, 463 U.S. 582 (1983), held that on its face, Title VI likewise requires a showing of discriminatory intent. In *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 591 (1983) (Opinion of White, J.), a highly fragmented Court concluded in an employment context case that an adverse impact action could be brought under Title VI based on administrative regulations by "those charged with enforcing Title VI." Plainly, Title VI does not provide non-civil rights agencies like the EPA with freewheeling license to devise and enforce new theories of civil rights liability. Cf. *NAACP v. FPC*, 425 U.S. 662 (1976). The Court has declined to extend federal regulatory authority power to the states absent explicit congressional enactment. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); see also *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); *Suter v. Artist M.*, 503 U.S. 347 (1992).

The interim guidance demonstrates Congress's wisdom in restricting regulatory agencies to their assigned areas of competence. The adverse impact theory, developed in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and refined through subsequent judicial decisions and congressional modification has been widely applied only in the discrete circumstances of employment discrimination. In the employment context, a prima facie case of discrimination arises when a facially neutral selection device yields statistically significant disparities when applied to the relevant qualified labor market. The prima facie case may be rebutted by a legitimate business purpose for the selection device. The plaintiff then must show that there exists an equally valid selection criterion that would not produce the same amount of adverse impact.

Adverse impact theory is logically inapplicable in the environmental permitting context for an array of reasons. In defining adverse impact, the interim guidance mixes apples and oranges. Under *Griggs*, adverse impact applies to a selection device (e.g., a test) used by a single actor to make a significant number of employment decisions. In amending the Civil Rights Act in 1991, Congress made clear that adverse impact theory is to be applied to "a particular employment practice." 42 U.S.C. § 2000e-2(j). Under the interim guidance, the agency is looking at *separate* decisions that presumably apply different selection factors in each context. Because the criteria used are different in each instance (and indeed there may be different decisionmakers), the collective sum of the decisions cannot be subjected to adverse impact scrutiny. The probative value of adverse impact theory simply does not apply.

Moreover, the assumption underlying *Griggs* is that all things being equal, if a group of applicants is relatively equally qualified, a nondiscriminatory selection device should yield roughly proportionate outcomes. That is simply not true in the context of environmental permitting. Many neighborhoods in America are either disproportionately minority or disproportionately nonminority. Hence, completely absent racial motivation, many individual site decisions will have an "adverse impact" one way or the other. The rigorous requirements of discriminatory intent should not be shortcut in favor of adverse impact because the community itself typically is involved in the decisionmaking, the EPA is enforcing environmental safeguards, and a wide variety of factors typically influences site selections. Despite those factors, the interim guidance infers discrimination based solely on the ethnic composition of areas surrounding the sites. We are aware of no U.S. Supreme Court precedents finding such facts sufficient to establish a prima facie case of discrimination.

Not only is the standard for establishing adverse impact inadequate in the interim guidance, but the guidance infers harm from the mere existence of a site, and disallows compliance with EPA's environmental standards as a defense. The failure in such circumstances would seem not to be not the site selection but EPA's safeguards. Compliance with EPA safeguards should have the same legal effect as the use of a professionally "validated"

test under Title VII of the Civil Rights Act of 1964--adverse impact is no longer relevant because the test (or, in this case, the facility) meets objective standards. It makes no sense to hold only some permits to EPA's standards, but not others, simply because one site has a different racial mix than the other.

The failure to accept a site that meets applicable environmental standards is exacerbated by the provision in the guidance that "[i]mportantly, a justification offered will not be considered acceptable if it is shown that a less discriminatory alternative exists." Not only will that blanket requirement impel local decisionmakers to engage in race-conscious site selections, but it will be with apparently little or no regard to cost or the relative merits of particular sites. Instead of ensuring that race is irrelevant in the site selection process, the guidance elevates race to a central--apparently the *only*--consideration.

Most fundamentally, the triggering of additional requirements if a site contains a disproportionate percentage of minorities (or, presumably, a disproportionate percentage of nonminorities) is *itself* on its face a racial classification, because government action is predicated upon the race of the people affected. Indeed, it will create an incentive for decisionmakers to choose a site *because of* the race of the people affected, in order to avoid claims under Title VI. In such circumstances, the EPA must demonstrate that the guidance is narrowly tailored to demonstrate a compelling governmental interest. Mere assertions of "societal discrimination" are inadequate. See, e.g., *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995).

Just a few weeks ago, the U.S. Court of Appeals for the District of Columbia Circuit invalidated a similar effort by the Federal Communications Commission to employ statistical devices to enforce civil rights policies of its own making. *Lutheran Church--Missouri Synod v. Federal Communications Comm'n*, 1998 U.S. App. LEXIS *7387 (D.C. Cir. Apr. 14, 1998). We have little doubt that a similar fate will meet this guidance if the EPA adopts it.

II. ENVIRONMENTAL JUSTICE CLAIMS OFTEN EMPLOY QUESTIONABLE STATISTICAL METHODOLOGY HAVING LITTLE TO DO WITH REAL ENVIRONMENTAL RISKS.

Many of the claims made in support of "environmental justice" policies are suspect. Many of the studies supporting those claims employ inappropriate methodology. For instance, some define "minority" communities as areas where the percentage of nonwhite residents exceeds that of the population generally, so that a community may be deemed "minority" even if a majority of its residents are nonwhite. They ignore population densities, without specifying the composition of the precise population affected. Related to that defect, they derive racial demographics from zip codes rather than more precise census tracts. They fail to

differentiate between racial demographics when the site was selected and when the study was conducted, thereby overlooking the characteristics of people who moved to or away from the facility after it was constructed. They imply rather than explicitly identify environmental risks from the facilities. For a study that takes such factors into account, see Douglas Anderton, et al., "Hazardous Waste Facilities: 'Environmental Equity' Issues in Metropolitan Areas," 18 *Evaluation Review* 123 (April 1994). See generally Thomas Lambert, Christopher Boerner, and Roger Clegg, "A Critique of 'Environmental Justice'," *National Legal Center for the Public Interest White Paper* vol. 8, no. 1 (January 1996).

The guidance itself fails to define relevant population comparisons: Are minorities disproportionately affected if the site area contains more minorities than the city, county, state, or nation--or does that depend on the agency's whim? Do the same standards apply if whites are disproportionately impacted? How are racial and ethnic categories defined? Are blacks, Hispanics, and Asians from different national backgrounds treated as discrete groups, or are they considered fungible?

All of those ambiguities make it impossible for local decisionmakers to conform to agency standards. The formula adopted by the agency is, moreover, hopelessly subjective: the guidance recites that the EPA will weigh (1) the degree of the disparate impact *plus* (2) the amount of pollution *minus* (a) mitigation of adverse impact and/or (b) mitigation of pollution and/or (c) "supplemental mitigation projects" *versus* (4) the "substantial, legitimate interests" in favor of the permit. As if that were not vague, confusing, or standardless enough, the guidance recites that "*EPA may decide to follow the guidance provided in this document, based on its analysis of the specific facts presented.*" (Emphasis ours.) This statement more resembles *Alice in Wonderland* than the rule of law required by the due process guarantee of the Fifth Amendment. Yet it is the necessary and predictable result of EPA's departure from its statutory mission.

A prime example of the unfortunate disconnect between reality and methodology in the enforcement of environmental justice policies is the currently pending Clean Air Act permit application filed by Shintech Corporation to build a poly-vinyl-chloride plant in St. James Parish, Louisiana. The plant, if permitted, would provide over two thousand construction jobs and 165 plant positions in an area struggling with high unemployment and poverty. Despite widespread support in the predominantly African-American community and the Louisiana NAACP for construction of the plant, an environmental legal clinic has filed a petition with the EPA challenging the proposed plant on environmental justice grounds. As a result of the petition and based solely on statistical data, the EPA has halted construction of the plant deemed desirable by the community.

The statistical data relied on by the EPA is highly questionable. A physical survey of the area around the proposed plant located only four homes within one mile of the plant site. Nevertheless, an EPA report filed in January concluded that a larger number of people would be affected by the plant, based on the factually inaccurate assumption that the population listed in census blocks for the area is evenly distributed. In other words, the EPA is relying on false assumptions derived from statistical data rather than the actual circumstances to determine the fate of a major industrial project that apparently would cause little environmental harm while creating jobs for the impoverished minority communities.

Equity studies often overlook benefits to the communities, particularly employment opportunities that may have a positive effect on health. For instance, the studies do not differentiate between health problems caused by the facilities at issue as contrasted with other causes associated with poverty, such as poor nutrition and access to health care. Thus, expanded economic opportunities in a community may contribute to *improved* health conditions. Communities should be allowed to determine their relative priorities and to negotiate acceptable conditions, so long as environmental safeguards are satisfied. There is no reason to allow nonminority communities this authority while denying it to minority communities. Either environmental standards are met or they are not--the standards should not and must not depend upon the race of the affected communities.

CONCLUSION

Little evidence exists that minority communities have been disproportionately selected for waste disposal sites, let alone targeted for such sites. Yet it is the latter concern to which federal civil rights law is directed. EPA was not intended to be a civil rights law enforcement agency, and this guidance purports to confer sweeping powers upon the agency that are well beyond its authority and competence.

In sum, we urge that the EPA be guided in this area by two simple principles:

1. The application of highly specialized antidiscrimination tools to environmental permitting should be guided by express congressional determination, rather than inferred and enforced by an administrative agency that is neither authorized nor competent to interpret and expand civil rights statutes.

2. The EPA should ensure that all facilities meet applicable environmental standards, so that individuals are protected regardless of their race. A single standard should guide EPA permitting determinations, rather than different standards triggered by the racial composition of the community.

The EPA's interim guidance exceeds the agency's statutory authority, raises serious constitutional concerns, and will expose the agency and taxpayers to unnecessary legal challenges. We urge the agency to conform its policies and practices to its express statutory mandate.

Respectfully submitted,

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